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Comprehensive dialogue with United Nations agencies and funds

Information received from non-governmental organizations in consultative status with the Economic and Social Council

Indian Law Resource Center

I. Introduction

1. The Indian Law Resource Center[1] hereby submits information as a contribution to the note of the Secretariat on indigenous peoples' rights and safeguards in projects related to reducing emissions from deforestation and forest degradation (E/C.19/2013/7) and the note of the Secretariat on the review of World Bank operational policies (E/C.19/2013/15), both of which have been submitted to the Permanent Forum on Indigenous Issues at its twelfth session. In the present document, the Center identifies critical issues for indigenous peoples relating to ongoing safeguard policy processes at the World Bank and at institutions engaged in REDD-plus initiatives, which aim to reduce emissions from deforestation and forest degradation in developing countries.

2. Development and REDD-plus initiatives may harm or benefit indigenous peoples, depending on whether indigenous peoples' rights are meaningfully incorporated into relevant policies and practices. The mere existence of safeguard policies is insufficient. In order to prevent harm, safeguards must reflect a larger human rights-based approach.

* E/C.19/2013/1.

[1] The Indian Law Resource Center is a non-profit law and advocacy organization in consultative status with the Economic and Social Council that was established and is directed by American Indians (www.indianlaw.org).

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II. Safeguards and the World Bank

3. The World Bank is currently in the process of reviewing and reformulating its policies for managing social and environmental risks and impacts, including its safeguard policies on indigenous peoples, environmental assessments and involuntary resettlement.[2]

4. Although important for mitigating impacts, the safeguards are insufficient for preventing harm to indigenous peoples and their environments. In critical areas, the safeguards fall short of the standards in the United Nations Declaration on the Rights of Indigenous Peoples. In addition, affected communities and independent studies have confirmed the existence of significant problems with safeguard implementation.[3] Finally, the World Bank is increasingly exempting finance mechanisms from safeguard requirements.

5. In 2012, the World Bank initiated a review of 8 of its 10 safeguard policies, as well as of its policy on the use of borrower systems, which establishes when countries' own regulatory systems may be used in lieu of safeguards, with a view to developing a new integrated framework. The review is unprecedented in scope, involving a rethinking of the Bank's overall approach to social and environmental protection.

6. The review, scheduled to last until June 2014, could have a profound impact on indigenous peoples. Because the safeguards have also been adopted by other multilateral development banks, national development agencies, private financial institutions and climate institutions, they have the potential to set the global standard for development and climate finance, not only to determine the effects of projects financed by the World Bank.

III. Safeguards and REDD-plus initiatives

7. Because REDD-plus initiatives deal directly with indigenous peoples' ownership of and access to lands and resources, effective REDD-plus safeguards are critical.[4] REDD-plus safeguard policies currently being developed by institutions such as the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD Programme), the World Bank's Forest Carbon Partnership Facility, conservation organizations and bilateral arrangements vary greatly. While REDD-plus institutions

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[2] For information on the safeguard policies of the World Bank, see http://go.worldbank.org/WTA1ODE7T0; for information provided by the Indian Law Resource Center on multilateral development banks, see www.indianlaw.org/mdb.

[3] "Implementation of the World Bank's indigenous peoples policy: a learning review (FY 2006-2008)", Operations Policy and Country Services Working Paper (World Bank, August 2011). Available from http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous_peoples_review_august_2011.pdf. See also the findings of the Inspection Panel of the World Bank (http://go.worldbank.org/7RCPYOF0C0).

[4] See Leonardo A. Crippa and Gretchen Gordon, *International Law Principles for Redd+: the Rights of Indigenous Peoples and the Legal Obligations of REDD+ Actors* (Washington, D.C., Indian Law Resource Center, 2012). Available from http://www.indianlaw.org/sites/default/files/Indian%20Law%20Resource%20Center_REDD+%20Principles.pdf.

are increasingly acknowledging indigenous peoples' rights, they often fail to incorporate those rights into their policies in a meaningful way.

IV. Human rights obligations

8. States have the international legal obligation to respect human rights and to prevent and redress human rights violations, including when acting collectively through entities like multilateral development banks, the UN-REDD Programme or the Global Environment Facility. International intergovernmental organizations implementing development or REDD-plus projects must respect human rights and avoid complicity in host countries' failures to comply with international obligations.[4]

9. The United Nations Declaration on the Rights of Indigenous Peoples provides that the specialized agencies of the United Nations (e.g. the World Bank) and other intergovernmental organizations shall contribute to the full realization of the rights of the Declaration (article 41). In addition, the Conference of the Parties to the United Nations Framework Convention on Climate Change agreed, in its decision 1/CP.16 (FCCC/CP/2010/7/Add.1), that human rights should be respected in all climate change activities and established safeguards for REDD-plus activities; it also decided that activities should be consistent with the objectives of international agreements and respect the rights and knowledge of indigenous peoples. Many REDD-plus entities, including the UN-REDD Programme, the Forest Carbon Partnership Facility and the Global Environment Facility, have internal policies requiring respect for indigenous peoples' rights and compliance with international obligations.

V. A human rights-based approach

10. Several REDD-plus institutions, including the UN-REDD Programme and the Forest Carbon Partnership Facility, have guidelines on engaging with indigenous peoples. Both institutions state as a matter of policy that their guidelines are consistent with the obligations of the Conference of the Parties to the United Nations Framework Convention on Climate Change to respect indigenous peoples' rights. While this is laudable, merely claiming that their policies are coherent does not make them so. The Facility, for instance, erroneously states that its standard of "broad community support" is essentially equivalent to free, prior and informed consent. Even when policy statements follow international human rights standards, such policies cannot be considered adequately protective of human rights if they are not binding and enforceable.

11. While development and REDD-plus institutions, including the UN-REDD Programme, increasingly acknowledge that they have human rights obligations, the World Bank has been reluctant to do so. The Bank maintains a double standard because it prohibits financing for projects that would contravene a borrowing country's obligations under international environmental agreements but not its obligations under human rights treaties (see the Bank's operational policy on environmental assessments). Bank safeguards, moreover, fall short in key human rights areas, including self-determination, the right to lands, territories and resources, and free, previous and informed consent, as explained below.

VI. Self-determination and self-government

12. The United Nations Declaration on the Rights of Indigenous Peoples recognizes indigenous peoples' right to self-determination (article 3) and self-government (article 4). It also affirms their right to maintain and develop their political, economic and social systems or institutions (articles 5 and 20), to make decisions regarding their lands and resources (articles 26 and 32) and to receive just and fair redress if deprived of their means of subsistence (article 20). The Declaration also recognizes that indigenous peoples have the right to be actively involved in developing and determining economic and social programmes affecting them, and as far as possible, to administer such programmes through their own institutions (article 23).

13. Whereas States are increasingly recognizing indigenous peoples' governments, the World Bank and most REDD-plus institutions do not. While indigenous peoples are sometimes consulted on mitigation and benefit plans, in most cases they are not provided with a way to articulate or administer their own development or REDD-plus plans in line with their priorities. Projects fail to respect indigenous peoples' systems of decision-making and governance when they impose external consultation processes and resource management strategies.

VII. Lands, territories and resources

14. The United Nations Declaration on the Rights of Indigenous Peoples recognizes indigenous peoples' right to traditional ownership, including collective ownership, and their right to own, use, develop and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired (article 26). The Declaration also lays out the duty of States to recognize and protect such lands, territories, resources and environments (articles 26, 27 and 29), and provides for redress for lands, territories and resources taken, used or damaged without free, prior and informed consent (article 28).

15. The World Bank's operational policy on indigenous peoples fails to require recognition of indigenous peoples' full collective ownership of their lands, territories and resources. Instead, borrowers are required to secure legal recognition of indigenous peoples' lands only when a project involves land acquisition or titling. The policy allows the Bank and borrowers to reduce collective ownership rights to mere use rights, and to divide communal lands. Recognition of land and resource rights has been found to be the most poorly implemented aspect of the policy.[3] Similarly, while most REDD-plus policies recognize the importance of securing land tenure, the vast majority fail to require recognition of indigenous peoples' full ownership rights.

VIII. Free, prior and informed consent

16. The United Nations Declaration on the Rights of Indigenous Peoples establishes free, prior and informed consent as a key legal standard governing projects affecting indigenous communities and their environment. Moreover, any

project that has a substantial effect on indigenous peoples' lands, territories and resources implicates article 26 of the Declaration, which provides that indigenous peoples have the right to govern and manage their lands, territories and resources.

17. The World Bank's operational policy on indigenous peoples does not require free, prior and informed consent as a precondition for financing activities on or involving indigenous peoples' lands or resources. Instead, it utilizes a standard of "free, prior, and informed consultation" resulting in "broad community support". This standard imposes external processes and measurements of support or opposition, undermining indigenous peoples' right to make their own development decisions and to establish and maintain their own decision-making institutions. Additionally, the policy neither provides indigenous peoples with the opportunity to withdraw consent in the event of changed circumstances nor does it require independent verification.

18. Although many REDD-plus safeguards have some sort of requirement regarding free, prior and informed consent, in many cases the actual protocols are ineffective and fail to guarantee the right to give or withhold consent (they do not provide adequate information to ensure that the consent given is in fact informed) and to ensure that indigenous peoples determine decision-making and consent processes.

IX. Recommendations

19. The World Bank and the REDD-plus institutions should respect the rights of indigenous peoples by carrying out the following actions:

(a) Prohibit financing for activities that violate or contribute to human rights violations, including any project that may affect indigenous peoples in voluntary isolation;

(b) Ensure that policies meet minimum international human rights standards;

(c) Where a host country's laws fail to meet minimum international human rights standards, ensure that projects are not implemented without adequate measures guaranteeing protections consistent with such standards;

(d) Establish mechanisms that allow indigenous peoples, through their own decision-making and governance systems, to develop and freely make decisions about project proposals, including with regard to their modification and rejection;

(e) Finance activities that strengthen the autonomy and the capacity of indigenous peoples to manage their territories, and ensure that indigenous peoples can design and manage projects involving their lands or resources;

(f) Adopt as a governing requirement the legal recognition of indigenous peoples' right to full collective ownership of their lands and natural resources, including lands acquired by means other than traditional or customary occupation or use, and ensure that benefit-sharing with indigenous peoples is consistent with ownership rights;

(g) If indigenous peoples' land, territories and resource rights are violated, ensure that compensation takes the form of lands, territories and resources equal in quality, size and legal status or other redress consistent with international law;

(h) Prohibit the involuntary resettlement of indigenous peoples and the placement of involuntary restrictions on livelihood activities or on access to natural resources;

(i) Ensure that project proponents obtain the free, prior and informed consent of indigenous peoples, with third party verification, for any projects on or involving indigenous peoples' lands, territories or resources, or that may substantially affect their lands, territories or resources, or their human rights.

(j) Ensure that protocols on free, prior and informed consent include an agreement between indigenous communities and the State identifying due redress measures and withdrawal processes;

(k) Require the use of human rights impact assessments to identify rights-holders and human rights risks, and prevent and redress project-related rights violations.

20. The Permanent Forum should carry out the following actions:

(a) Promote the reform of international finance policies and practices to bring development banks and REDD-plus institutions into compliance with the Declaration, including by providing technical assistance, submitting expert recommendations and actively engaging in the World Bank safeguards review;

(b) Help ensure that consultation processes at the World Bank and REDD-plus institutions are representative and allow for indigenous peoples' full and effective participation.